would have been bitterly contested. But no such doubt occurred to Massachusetts lawyers.

On principle it would seem desirable that a religious society in a country of religious equality should be allowed to change its faith without losing its property. It is of course true that, if property be given in trust for the support of certain doctrines, it ought not to be used by those not entertaining such doctrines, and a court of equity may be forced to undertake the difficult task of defining what doctrines the donors intended to support, and just how far the trustees may deviate therefrom. But it need not be implied that property left to a church under a denominational name was intended to be used only to forward the doctrine which the church then held. Would it not be wise to consider the property as left to the church for such religious and charitable uses as it might think best, always having regard to the donor's express declaration? This whole matter is well threshed out in *Hale* v. *Everett*, 53 N. H. 9–276, in a very long opinion against the heretical majority of the church, and a still longer and very able dissenting opinion by the late Chief Justice Doe, then Associate Justice.

RECENT CASES.

AGENCY — VICE-PRINCIPAL RULE. — *Held* (three judges dissenting), that the head of a section squad on a railway is not a vice-principal when his negligence in managing a brake causes injuries to a hand working under him. The vice-principal doctrine recognized. *Northern Pac. Ry. Co.* v. *Peterson*, 16 Sup. Ct. Rep. 843.

The decision sustains the better view of the vice-principal doctrine, that superiority of position does not constitute the relation, but that it exists only where a manager is in charge of a department acting for the principal. But the case is interesting as showing a change of view in the Supreme Court toward the vice-principal theory itself. The theory was recognized in *Ry. Co.* v. *Ross*, 112 U. S. 377; qualified in *Ry. Co.* v. *Baugh*, 149 U. S. 368; and all but repudiated in *Ry. Co.* v. *Hambly*, 154 U. S. 349, and *Ry. Co.* v. *Keegan*, 160 U. S. 259.

BILLS AND NOTES — BILL RAISED BY FILLING IN BLANKS — EFFECT OF NEGLIGENCE OF ACCEPTOR. — L. accepted a bill for £500 bearing a stamp sufficient to cover a bill for £4,000, and with blank spaces upon it which were afterwards fraudulently filled up so as to make the bill read as one for £3,500. In that condition it was negotiated to the plaintiff, who took it in good faith and for valuable consideration. *Held*, the acceptor was liable only for £500 on the bill. *Scholfield* v. *The Earl of Londesborough*, 12 *The Times* L. R. 604.

The ultimate ground of this decision in the House of Lords is that the defendant was not in fact guilty of negligence in accepting the bill in the condition in which it was when brought to him, but the Lord Chancellor proceeds vigorously to attack the doctrine of *Young* v. *Grote*, 4 Bing. 253, that one who facilitates forgery by another affects the validity of the instrument forged as against himself, which doctrine he traces to the civil law. "I am not aware," says the learned Chancellor, "of any principle known to the law which should attach such consequences to a written instrument when no such principle is applicable in any other region of jurisprudence where a man's own carelessness has given opportunity for the commission of a crime. A man, for instance, does not lose his right to his property if he has unnecessarily exposed his goods, but could recover against a *bona fide* purchaser of any article so lost, notwithstanding the fact that his conduct had to some extent assisted the thief." That the principle is not known in any other region of jurisprudence would not seem fatal to its existence as a part of the law of negotiable paper, founded as it is upon the custom of merchants. That some degree of care should be required of one who helps into existence an instrument intended to circulate from hand to hand as money seems self-evident. If one can with impunity create an instrument of such a kind that it presents an obvious opportunity to a dishonest holder of effecting a fraud, it is a serious diminution of the usefulness of negotiable paper, in so far as it tends to hamper its free circulation.

BILLS AND NOTES — GUARANTY OPERATING AS INDORSEMENT. — The payee of a negotiable note indorsed it: "I guaranty the within note, waiving notice of protest and demand." *Held*, that these words operated as an indorsement and not as a mere assignment. *Dunham* v. *Peterson*, 67 N. W. Rep. 293 (N. Dak.).

The view taken seems to be that the guaranty over the signature in no way prevents the signature from operating as an indorsement; that the writer is "an indorser with enlarged liability." The difficulty with such a view is that the signature is affixed to and really forms part of the guaranty, and a guaranty is not a negotiation of a note. See *Tuttle* v. *Bartholomew*, 12 Metc. 454; *Trust Co.* v. *National Bank*, 101 U. S. 68. The latter decision also indicates that under so unusual a form of transfer, if it be assumed to be valid, the transferee should not take free from equitable defences possessed by the maker.

CARRIERS — INVALID TICKET — EJECTION. — A passenger bought an excursion ticket to A, which on its face read that in order to be good for the return trip, it must be stamped by an agent at A. No agent could be found by the passenger, and so he tendered the unstamped ticket for his return passage. Upon the conductor's declining to accept it, he refused to pay fare, and was put off. *Held*, he could not recover in trespass for his ejection. *Western Maryland R. Co.* v. *Stocksdale*, 11 Atl. Rep. 880 (Md.).

The decision seems sound. A recent Indiana case, however, in which the facts were almost identical with the above, reached the opposite result. But the doctrine of the Maryland case has the weight both of principle and authority in its support. 9 HARVARD LAW REVIEW, 353; Hutchinson's Law of Carriers, 2d ed., § 580 *h*. Strong considerations of policy favor the rule, now pretty generally recognized, that a ticket is a formal contract, and that the conductor is justified in basing his action upon its express terms, regardless of any explanations to the contrary by the holder. If this be the correct view, there was no wrong in the ejection. The passenger could and should have avoided it by simply paying his fare, which he would subsequently recover from the railroad. Selling him an imperfect ticket was the company's real wrong, and for this he has his appropriate remedy.

CARRIERS — LIABILITY FOR BAGGAGE. — The defendant company received the baggage of the plaintiff, having been misled by the act of a third party into the belief that the plaintiff was going to take passage over their line. The plaintiff in fact went by another route, his baggage being lost by the negligence of the defendant while in transit. *Held*, that since the defendant intended to receive the baggage only as baggage accompanying the passenger and without other charge, they did not receive it as common carriers, that their duty of care was less than that of any class of bailees, and that their negligence in this case was not so gross as to entail liability. *Beers* v. *Boston & Albany R. R. Co.*, 34 Atl. Rep. 541 (Conn.).

No authority in point is cited in support of this decision and it seems at least questionable. No matter how mistaken the defendant was, a voluntary bailee of the baggage for transportation and on full knowledge of the facts could have demanded freight and have retained the goods under a lien for payment. Hutchinson on Carriers, §§ 1, 19. This being so, they owed a carrier's duty to the owner of the goods, and should be held liable for their loss.

CONSTITUTIONAL LAW — ABILITY OF CONGRESS TO PAY DEBTS FOUNDED ON MORAL CONSIDERATIONS. — *Held*, the Act of Congress appropriating a certain sum to sugar manufacturers who would have been entitled to bounties under the Tariff Act of 1890, had it not been repealed in 1894, is valid and constitutional, irrespective of the constitutionality of the original bounty provision. *United States* v. *Realty Co.*, 16 Sup. Ct. Rep. 1120.

The case is interesting, aside from its containing a summary of sugar legislation, as showing the nature of debts which Congress is authorized to pay. Such debts include not only claims of such a nature as to be legally enforceable against an individual, but also moral obligations founded on equitable or honorable considerations. Assuming the unconstitutionality of the provision authorizing the payment of sugar bounties, yet there is such an honorable obligation on the part of the government towards those who, in good faith altered their position in reliance upon that act, that an appropriation for their benefit is to be regarded as the payment of a "debt" in a moral and equitable sense. In deciding whether the facts of a given case bring it within the class of obligations founded on moral considerations Congress must be its own judge, and its decision can rarely if ever be reviewed by the judiciary.

CONSTITUTIONAL LAW — FREEDOM OF SPEECH. — The performance of a play, based on the facts of a murder case on trial will not be enjoined, such action being in violation of the constitutional provision as to freedom of speech and of the press. *Dailey* v. *Superior Court*, 44 Pac. Rep. 458 (Cal.). See NOTES.

CONSTITUTIONAL LAW — INCRIMINATING TESTIMONY. — *Held*, that, where an executive pardon is granted as a matter of practice to accomplices who give full evidence in the prosecution of their fellows, the equitable right to this does not affect the constitutional privilege of a witness not to incriminate himself by his own testimony. *Ex parte Irvine*, 74 Fed. Rep. 954 (Ohio).

This case proceeds on the reasoning of *Counselman* v. *Hitchcock*, 142 U. S. 547, that the proffered pardon was not sufficiently broad in its scope to protect the witness fully from the many consequences resulting from his testimony which the constitutional provision was intended to cover. No reference is made to the later case of *Brown* v. *Walker*, 16 Sup. Ct. Rep. 644 (see note, HARVARD LAW REVIEW, June, 1896), which reaches a contrary decision on facts hard to be distinguished but more resembling the present case.

CONSTITUTIONAL LAW — NOTARIES PUBLIC — APPOINTMENT OF WOMEN. — *Held*, that under the 4th Amendment to the Constitution of Massachusetts, providing that notaries public shall be appointed by the Governor in the same manner as judicial officers are appointed, i. e. by and with the advice and consent of the Council, the legislature cannot confer power upon the Governor and Council to appoint women to that office. 43 N. E. Rep. 927 (Mass.).

This is an extension of the doctrine laid down in the opinion of the judges in 150 Mass. 586, that under the same amendment a woman could not be appointed a notary public in the absence of any legislation upon that subject. In both instances the opinion is based upon the ground that, at the time of the adoption of the amendment (1821), the nature of the office and custom of appointment to it were such that it could not have been intended that women should fill it. The question presented here is one of the construction of the Constitution in view of the common law at the time of its adoption, and a similar opinion prevails in some other States. Its grounds are purely historical, and not of the philosophic character of the arguments of Mr. Justice Bradley in *Bradwell* v. *The State*, 16 Wall. 130. Had this amendment been adopted in these later days, it would seem doubtful if the court would hold that the common law was unchanged in view of the great numbers of women so generally appointed notaries in the Western States. The legislation in Massachusetts admitting women to the bar, and a later statute providing that such women as had qualified as attorneys might be appointed special commissioners to take depositions, together with the repeated requests of the legislature for opinions as to the constitutionality of appointments of women to the office, indicate an inclination of the community to grant to women at least some of the most important powers attaching to the office. It would seem as if the other powers of a notary could be similarly conferred by other statutes without the necessity of a constitutional amendment for which as yet no vigorous demand has arisen.

CONTRACTS — DAMAGES — PROSPECTIVE PROFITS — PREVENTION. — Where, under a contract for the manufacture and delivery of bricks by the plaintiff, and payment therefor in instalments by the defendant, such part of the bricks as had been manufactured having been delivered and partly paid for, the defendant refused to accept further deliveries, and plaintiff did not offer to complete performance upon his part. *Held*, that the plaintiff was entitled to recover only the amount of the unpaid instalments with interest, and not the profits which would have accrued to him had the contract been completed. *Bethel* v. *Salem Imp. Co.*, 25 S. E. Rep. 304 (Va).

The facts of this case are somewhat similar to those in *Cort* v. *Ambergate Ry. Co.*, 17 Q. B. 127; but here the court lays down more clearly the measure of damages where there has been no offer of completion of performance by the plaintiff. One of the grounds relied upon by the plaintiff was, that, by the failure of defendant to pay for the bricks already delivered, plaintiff was unable to go on manufacturing. But the court distinctly held that the mere failure to pay money in pursuance of a contract could not be considered a prevention of performance by the defendant. *Burr* v. *Williams*, 20 Ark. 185. The case is clearly right.

CONTRACTS — RIGHT OF A THIRD PARTY TO SUE ON A CONTRACT FOR HIS BENEFIT. — *Held* (Ingraham, J., dissenting), that a promise made to the husband, in consideration of services rendered by him, to pay a sum of money to the wife, cannot be sued upon by the latter. *Buchanan* v. *Tilden*, 39 N. Y. Supp. 228. See NOTES.

CORPORATIONS — STOCK — LIFE TENANT — STOCK DIVIDENDS. — A testator bequeathed stock in a corporation to plaintiff for life, remainder to another. Stock dividends were declared from net earnings accrued since the testator's death. *Held*, a life tenant is entitled, as income, to stock dividends declared from net earnings accrued during his life tenancy. *Pritchett* v. *Nashville Trust Co.*, 36 S. W. Rep. 1064 (Tenn.).

The principal case adopts the Pennsylvania doctrine which, originating in *Earp's Appeal*, 28 Pa. St. 368, now prevails in the great majority of American jurisdictions.

The Massachusetts doctrine that stock dividends never go to the life tenant as income has been adopted in the United States Supreme Court. *Gibbons* v. *Mahon*, 136 U. S. 549. The English decisions on the right to stock dividends as between life tenant and remainderman are in a very unsatisfactory condition. The Pennsylvania doctrine is approved in the more recent text-books. 1 Morawetz, Private Corporations, § 468; 1 Cook, Stock and Stockholders, § 554.

EQUITY — BIGAMOUS MARRIAGE — FRAUD OF PLAINTIFF. — Complainant, concealing the fact that he was already married, induced defendant to marry him. He afterwards filed his bill in equity, asking that his marriage with defendant be declared a nullity. *Held*, complainant's fraudulent conduct in procuring the bigamous marriage precluded him from relief in equity. *Rooney* v. *Rooney*, 342 Atl. Rep. 682 (N. J.).

The Court of Chancery in England did not take jurisdiction of a bill to have a marriage declared a nullity; such a suit fell within the jurisdiction of the Ecclesiastical Court. 2 Kent's Com., 14th ed., *76. In the Ecclesiastical Court a decree of nullity was pronounced at the instance of a plaintiff in the same situation as the complainant in the principal case. *Miles* v. *Chilton*, 1 Rob. Ecc. 684. This precedent was followed in a case in the Probate and Divorce Division of the English court. *Andrews* v. *Ross*, 14 P. D. 15.

In the absence of Ecclesiastical Courts in this country, equity has taken jurisdiction of suits to have a marriage declared a nullity. *Wightman* v. *Wightman*, 4 Johns. Ch. 343, at p. 346. But to take jurisdiction of a bill to declare a bigamous marriage a nullity, when the complainant had knowingly procured the marriage, would do violence to one of the fundamental principles of equity. Bishop, Mar., Div. and Sep., § 722, states the law as *contra* to the decision in the principal case, but the American authorities cited by him do not sustain his statement. In *accord* with the principal case, *Teft* v. *Teft*, 35 Ind. 44.

MORTGAGES — LIABILITY OF GRANTEE OF MORTGAGED PREMISES. — *Held* (Dunbar, J., dissenting), that a mortgagee may enforce the liability of a grantee of the mortgaged premises on his assumption of the mortgage debt. *Solicitors' Loan and Trust Co.* v. *Robins*, 45 Pac. Rep. 39 (Wash.). See NOTES.

PARTNERSHIP — STATUTE OF USES — TRUST DEED TO USE OF FIRM. — A statute provided that a conveyance in trust to the use of "any other person or persons or of any body politic" should vest the title in fee in the *cestui que use*. *Held*, that a deed conveying land in trust for the use of a firm, the firm being designated by the firm name, vested no legal title under the statute in the partnership firm or any of its members. *Silverman* v. *Keistufek*, 44 N. E. Rep. 430 (Ill.).

A partnership as such cannot hold the legal title to land (Parsons on Partnership, 4th ed., § 265, note 1); but there seem to be three views as to what effect a deed of land to a partnership has in conveying a legal title to the members of the firm. One view is, as shown by the principal case, that no one takes any legal estate. *Percifull* v. *Platt*, 36 Ark. 456. Another is in effect that any partner or partners whose names appeared in the firm name hold the land in trust for themselves and the other partners. *Moreau* v. *Saffarans*, 3 Sneed, 599; *Winter* v. *Stock*, 29 Cal. 407. The last view is that all the partners take the land as joint tenants or tenants in common. *Maughan* v. *Sharpe*, 34 L. J. C. P. 19; *Sherry* v. *Gilman*, 55 Wis. 324; *Powers* v. *Robinson*, 90 Ala. 225. The last view seems preferable in theory. All the partners must join in suit upon a covenant in a deed to a partnership (*Moller* v. *Lambert*, 2 Camp. 548; *Gates* v. *Graham*, 12 Wend. 53; *Brown* v. *Bostian*, 6 Jones (N. C.), 1); and if this is so it would seem that all the parties ought to be grantees as they are covenantees. The only objection to such a view is that it might lead to confusion in the examination of titles.

PERSONS — MARRIED WOMEN — ACTION FOR SEDUCTION. — The plaintiff was seduced by the defendant, subsequently married him, and afterward obtained a divorce on the ground that the marriage was obtained through fraud. She then brought suit against the defendant under a statute allowing "an unmarried female to prosecute as plaintiff an action for her own seduction." Another statute provided, in substance, that a married woman may bring an action as if sole for injuries to her person or character. *Held*, that unless the divorce amounted to a decree annulling the marriage, the plaintiff could not recover. *Henneger* v. *Lomas*, 44 N. E. Rep. 462 (Ind.).

The court put their decision on the ground that the statute permitting married women to sue as if sole, did not do away with the common law rule that any action a single woman may have had against her husband before marriage is lost by such marriage, and does not revive after divorce. This seems correct, and the cases cited sustain the decision. A narrower ground would have been to say that the legislature could not have intended the action for seduction to survive marriage with the seducer,

and consequently the right of action is lost unless the marriage is subsequently declared void *ab initio*.

PROPERTY — CHURCHES. — *Held*, that the majority of a church cannot change its doctrines, and still retain the property given to it, against the minority adhering to the faith in which the church was founded. *Smith* v. *Pedigo*, 44 N. E. Rep. 363 (Ind.). See NOTES.

PROPERTY — CONDITION SUBSEQUENT — SUB-LEASE OF ENTIRE TERM — ASSIGNABILITY OF RIGHT OF RE-ENTRY. — A., owner in fee, makes a lease to B., with conditions and a right of re-entry. B., makes a sub-lease to C. for the entire term, with the same conditions, and subsequently B. conveys to D. all his right and title in the premises. D. claims a right to enter on C. for breach of conditions. *Held*, B. having conveyed his entire estate, his right of entry is destroyed, and even if it existed he could not grant it to D., as it is not assignable. *Ohio Iron Co.* v. *Auburn Iron Co.*, 67 N. W. Rep. 221 (Minn.).

The court argue, from the fact that the sub-lease of a lessee's entire interest effects an assignment, that the sub-lessor can retain no right of entry. Such a view is reasonable, and accords with the tendency of the courts to alleviate the harsh results of the enforcement of conditions, but the point is held otherwise in England. *Doe* v. *Bateman*, 2 B. & Ald. 168. The question, however, is not necessary to the decision of the case, and the other point as to the assignability of such right of entry, assuming it to exist, is decided in accordance with the weight of authority. *Underhill* v. *Railroad*, 20 Barb. 455; *Rice* v. *Railroad*, 12 Allen, 141.

PROPERTY — DEDICATION OF PARK — ACCEPTANCE. — *Held*, that recording a plat of an addition to a city, on which a part of the land is designated as a "park," and the sale of lots with reference thereto, constitute an irrevocable dedication of the land so marked as a park, without the necessity of an acceptance by the public. *Rhodes* v. *Town of Brightwood*, 43 N. E. Rep. 942 (Ind.).

Aside from the fact that the land in question was not taxed for several years after the recording of the plat, there is no evidence in the case of an acceptance by the public prior to the time when the donor endeavored to revoke the dedication. It may well be questioned whether the fact that the park was not placed upon the tax list did not amount to an acceptance. As the court itself says: "This is rather an indication that all parties concerned understood that the land was dedicated to the public for a park, as shown on the plat."

However that may be, it would seem that the position taken by the court in this case is not warranted by the weight of authority. That position appears to be that acceptance by the public, either through formal action by the proper authorities or by common user, is unnecessary to the completion of the dedication of the land, where the rights of private individuals, such as purchasers of lots abutting on the supposed park, intervene. In conformity with this view, it has been held in New Jersey that no acceptance is necessary to vest the right in the public at once. *Methodist Church* v. *Hoboken*, 33 N. J. L. 13. But it is believed that, according to most authorities, there must be some act on the part of the public to indicate its willingness to accept the offered gift. See *Abbott* v. *Cottage City*, 10 East, Rep. 61; see also 5 Am. and Eng. Ency. of Law, p. 413, n. 1, and p. 415, n. 2, for further authorities. Although the question as to whether the public had a right to refuse to take the park was not discussed by the court in the principal case, yet this is certainly an important consideration. Surely, on principle the public should not be compelled to accept the legal responsibilities incident to the ownership of a park against its will. Whether the purchaser of lots abutting on a piece of land alleged by the vendor to be a public park has not a right of action against such vendor in case the said land has not been accepted as a park by the public, is, of course, a secondary question, not raised by the decision in *Rhodes* v. *Town of Brightwood*.

PROPERTY — FINDING CHATTELS ON PRIVATE PROPERTY. — The defendant, while cleaning out, under the plaintiffs' orders, a pool of water on their land, found two rings. The real owner was not discovered. In an action of detinue, *held*, that the plaintiff was entitled to the rings. *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44.

There is very little authority on the point decided in this case. The case most in point, *Hamaher* v. *Blanchard*, 90 Pa. 377, is directly *contra*. The question is one of a conflict of rights. Ordinarily a finder has the right of possession subject only to the claim of the true owner. But, on the other hand, the landowner has primarily the right to the chattel on his land by virtue of his general power to exclude others. Where, then, the finder is a trespasser or servant of the landowner, he has the position of finder in the one case through a violation of the law, and in the other case through the disregard of the right of his employer. The right of the landowner therefore sur-

vives and gives him the superior right to the chattel. This case may be said to represent the better law, and is well distinguished by the court from *Bridges* v. *Hawkesworth*, 21 L. J. Q. B. 75.

PROPERTY — FIXTURES — MORTGAGES. — *Held*, that a furnace, so placed in the cellar of a house that it can be removed without substantial injury to the building, does not pass under a prior mortgage of the house, in case it was placed therein under a contract providing that it should remain the property of the seller until paid for. *Duffus* v. *Howard Furnace Co.*, 40 N. Y. Supp. 925. See also *Willis* v. *Munger Manufacturing Co.*, 36 S. W. Rep. 1010 (Tex.).

The principal case raises an exceedingly interesting legal question. At least three judicial views have been advanced as to whether a chattel, when attached to the realty, is to become, under all circumstances, a fixture, and thus part of the real estate, or whether the chattel may not retain its character of personalty, if it is the subject of a chattel mortgage or of an agreement between the vendor of the chattel and the owner of the realty. In New York it is held that a chattel mortgagee holds even against a subsequent mortgagee, or purchaser, of the realty. See *Ford* v. *Cobb*, 20 N. Y. 344. In that jurisdiction, also, an agreement between the mortgagor of the realty and the vendor of the chattels that the chattels shall remain the property of the vendor until paid for, has the same effect as a chattel mortgage in preserving to the chattels the character of personalty, when otherwise they would have become fixtures and passed with the mortgage of the realty. See *Tifft* v. *Horton*, 53 N. Y. 377. The second view obtains in Massachusetts, where a mortgagee of the realty holds even against a subsequent chattel mortgagee. See *Clary* v. *Owen*, 15 Gray, 522. The third view is held in Vermont, where a mortgagee of realty holds the chattels annexed to the real estate prior to the execution of the mortgage, even though the mortgagor and the vendor of the chattels had agreed that they should continue as personalty, but where he does not hold chattels annexed after the execution of the mortgage. See *Davenport* v. *Shants*, 43 Vt. 546. It will be observed that the principal case follows the New York doctrine of *Ford* v. *Cobb*, but is, nevertheless, strictly in accord with the position taken by the court in *Davenport* v. *Shants*.

Either the New York or the Massachusetts doctrine seems too extreme to be finally adopted as the true rule of law on the point under discussion. The Vermont view, however, appears to be entirely equitable. An innocent purchaser or mortgagee of realty without notice certainly advances his money in the belief that the fixtures are part of the real estate, and the chattel mortgagee or conditional vendor must be understood as having agreed that the chattels should be thus affixed to the realty. On the other hand, when a chattel is annexed after the execution of the mortgage of the realty, the mortgagee is not misled into thinking that the fixture is part of his purchase, and no injustice results, if it is not included in the mortgage.

PROPERTY — LANDLORD AND TENANT — DEFAULT OF LESSEE AVAILABLE ONLY TO LESSOR. — *Held*, a provision avoiding a lease on failure of the lessee to fulfil the covenants is available only at the option of the lessor. *Edmonds* v. *Mounsey*, 44 N. E. Rep. 196 (Ind.).

The courts formerly drew a distinction between leases that were to be void upon a breach of conditions, and such as were voidable only. If a lessee for life was guilty of any breach, the lease was merely voidable, even though, by its terms, it was to become thereby entirely void; and the landlord might waive his right of re-entry by some act, such as the acceptance of rent, after the breach. In the case of a lease for years, on the other hand, the breach of a condition made the lease wholly and absolutely void. Taylor, Landlord and Tenant, § 492. The tendency of modern decisions has been, however, both in England and in the United States, to obliterate this distinction; and it now seems pretty well settled that the effect of a provision that failure on the part of the lessee to comply with certain requirements shall render the lease null and void, makes it void only at the option of the lessor. *Liggett* v. *Shira*, 28 Atl. Rep. 218. *Cochran* v. *Pew*, 28 Atl. Rep. 219. *Creveling* v. *West End Iron Co.*, 16 Atl. Rep. 184. The principal case is in line with this tendency of the law, and seems to be perfectly sound.

PROPERTY — INTERFERENCE WITH SUBTERRANEAN STREAM. — *Held*, that the owner of land, through which flows a well defined subterranean stream, has no greater rights with respect to the stream than he would have if it flowed upon the surface. *Tampa Waterworks Co.* v. *Cline*, 20 So. Rep. 780 (Fla.).

The English law seems to be still unsettled with respect to the point decided. See *Acton* v. *Blundell*, 12 M. & W. 324; *Chasemore* v. *Richards*, 7 H. L. C. 349. In this country, however, there are now a number of decisions favoring the view here taken. See *Whetstone* v. *Bowser*, 29 Pa. St. 59; *Haldeman* v. *Bruckhart*, 45 Pa. St. 514; *Bur-*

roughs v. *Satterlee*, 67 Ia. 396; *Strait* v. *Brown*, 16 Nev. 317; *Hale* v. *McLea*, 53 Cal. 578. It seems much more satisfactory to distinguish, as here done, between waters in well defined courses and waters percolating or draining, than to apply different rules to waters on the surface and those under ground, as indicated in *Acton* v. *Blundell*, *supra*.

PROPERTY — RIGHT OF LESSEE TO INSURANCE — LEASE WITH OPTION TO PURCHASE. — A lease of a portion of a business block required the lessee to pay taxes and insurance on, and keep in repair, the entire premises, and gave him the option of purchasing the premises during or at the expiration of the lease, for a certain price, on which rent paid prior to the exercise of the option was to be credited. No provision was made in the lease for the application of proceeds of insurance in case of loss. The lessee insured in the lessor's name to an amount agreed upon by them, and, a loss occurring, the lessor received the insurance money, and expended part of it in restoring the premises. On subsequently exercising his option of purchase, *held* that the lessee was entitled to have the balance of the insurance money in the lessor's hands credited as a payment on the price. *Williams* v. *Cilley*, 34 Atl. Rep. 765 (Conn.).

There appears to be a singular absence of authority in point. The court expressly states that the decision is largely based on the peculiar facts of the case, and should be confined to them rather than laying down a broad rule applicable in general to contracts of option. Much importance is attached to the fact that the plaintiff's relation to the premises in question, as lessee of a *portion* thereof, was designed, intended, and understood by the parties to be "subordinate and incidental to the broader connection with the entire property as an inchoate or initiate purchaser"; and that the insurance on all the property was paid by the lessee to protect both parties. If this construction can be put upon the facts, the decision seems eminently sound, since the insurance money, though paid to the defendants as owners of the legal title to the property, would then become what the property itself was, a thing to which an equity attached.

PROPERTY — RIGHT TO SUPPORT OF LAND. — *Held* (Holmes, Knowlton, and Lathrop, JJ., dissenting), that a city digging a ditch in the highway is liable for damages to abutting land, resulting from the withdrawal of quicksand from under its surface, which is taken out with the percolating water by pumps. *Cabot* v. *Kingman*, 44 N. E. Rep. (Mass.) 344. See NOTES.

PROPERTY — RIGHTS OF TOMB OWNER. — Surviving relatives placed the remains of their dead in a certain tomb, relying on the assurance of the tomb owner that the remains should rest there undisturbed forever. *Held*, that such tomb owner could be enjoined from removing the remains to another place of burial. *Choppin* v. *Labranche*, 20 So. Rep. 681 (La.).

The court admit that no easement or right of property in the tomb was acquired by the gratuitous promise of the tomb owner, but they enforce his promise on the ground that the sanctity of the grave must be maintained. Notwithstanding this principle of public policy, it is hard to understand how a court of equity can enforce a mere revocable license. *Partridge* v. *First Independent Church*, 39 Md. 631, and *Craig* v. *First Presbyterian Church*, 88 Pa. St. 42, are opposed to the doctrine of the principal case.

SALES — WARRANTY. — Where an inferior article was shipped on an order, and was accepted, but breach of warranty set up in defence to an action, *held*, that there is an implied warranty that the goods are what were ordered and that the retention of them is not incompatible with a reliance upon the warranty, but is merely evidence of waiver of the right to sue. *Northwestern Cordage Co.* v. *Rice*, 67 N. W. Rep. 298 (N. Dak.).

There was probably an implied warranty (*Randall* v. *Newsom*, 2 Q. B. D. 102); and it is believed that the case is right in holding waiver of the right to sue merely a matter of intention based on the evidence. But the law is unsettled. If the warranty is express, the goods may be retained without prejudice to a right of action on the warranty (*Studer* v. *Bleistein*, 115 N. Y. 316, 325); and while it is sometimes held that there is no difference between an express and an implied warranty (*Bryant* v. *Isburgh*, 13 Gray, 607), the weight of decisions seems to be that where the goods are retained a breach of an implied warranty is waived. *Fairbank Canning Co.* v. *Metzger*, 118 N. Y. 260.

TORTS — LIBEL INVITED BY THE PLAINTIFF. — The plaintiff, learning that the defendant had in his possession a letter containing a libel on him, sent to him agents who by means of false representations, induced the defendant to read the letter to them. *Held*, that unless there had been a previous unprivileged publication the plaintiff could not recover. *Miller* v. *Donovan*, 39 N. Y. Supp. 820. See NOTES.

TORTS — NEGLIGENCE — LIABILITY OF MAKER. — Defendant, a contractor, remodelled a building so negligently that two years after it had been turned over to the

owner it fell and killed plaintiff's daughter who was passing. *Held*, that the contractor was not liable for injuries to the passers by. *Dougherty* v. *Herzog*, 44 N. E. Rep. 457 (Ind.).

Plaintiff was the guest of a member of a social club which had hired a coach of defendant for an excursion. Through defendant's negligence the coach broke down, injuring plaintiff. *Held*, that defendant was liable to guests of the club, since it must have been the understanding that guests were to use the coach, and in so doing they were merely carrying out a right which the club members had under the contract. *Glenn* v. *Winters*, 40 N. Y. Supp. 659.

In cases of this sort, most courts follow *Winterbottom* v. *Wright*, 10 M. & W. 109, and refuse to allow recovery by any one not a party to the contract. For instance, in *Curtin* v. *Somerset*, 140 Pa. St. 70, the builder of a hotel was held not liable for injuries caused by his negligence to a guest. Where, however, the article is dangerous to human life, the right of recovery is extended to any user of it, as in case of medicine with a wrong label. *Thomas* v. *Winchester*, 6 N. Y. 397. Though this exception is well settled by authority, it seems illogical. Outside this narrow class of cases it is very difficult to make any extension on principle which does not work injustice in practice and encourage frivolous suits. The extension suggested in *Glenn* v. *Winters*, as stated above, seems a good one if strictly interpreted, though it cannot be reconciled with *Curtin* v. *Somerset*, *supra*. But no court has yet gone so far as to allow recovery in a case like *Dougherty* v. *Herzog* (*supra*), where the plaintiff's daughter was in no way connected with the contracting parties.

TORTS — RECAPTION OF GOODS. — Defendant entered plaintiff's house without plaintiff's consent by force of a warrant to search for goods of his which had been wrongfully taken there by plaintiff; and while there he took also other goods which he had bailed to plaintiff. *Held*, that a license to enter to take the bailed goods was to be implied from the fact that the plaintiff had allowed them to be put there. *Madden* v. *Brown*, 40 N. Y. Supp. 714.

As the bailed goods were not covered by the warrant, the plaintiff in taking them became a trespasser *ab initio*, unless he could justify entry to take them without the warrant. Although it is doubtful how far a court would go to-day in sustaining the doctrine of trespass *ab initio*, the view taken by the court made the decision of that question unnecessary. There is no question as to the right to enter even a man's house to retake goods wrongfully taken there by him. But as to goods not wrongfully taken the correctness of the case is not so certain. In the cases of that sort where entry has been allowed, the ground is taken that a license to enter is to be implied from the relations of the parties. As, for instance, where goods are sold to be delivered on the premises. And the Massachusetts courts are inclined to restrict this doctrine very closely. *McLeod* v. *Jones*, 105 Mass. 405. There is a *dictum* of Littleton, J., often cited, in which he denies the right to enter a man's house to retake bailed goods. Note to *Webb* v. *Beavan*, 6 M. & G. 1055. The New York court seems to have gone very far in implying a license to enter from the mere fact of a bailment which had terminated.

TRUSTS — CONSTRUCTIVE. — A wife, receiving funds of her own, paid them over to her husband, without more. He invested them in land, telling her that he had invested the funds for her, but taking the title in himself. On his death it was sought to have the land declared a resulting trust. *Held*, that for a trust there must have been a contract or special promise by the husband to invest the funds for her, and his statements to her were not sufficient. *Nashville Trust Co.* v. *Lansom's Heirs*, 36 S. W. Rep. 977 (Tenn.).

Where the money is furnished by one person and the title taken in the name of another, it is generally declared a constructive trust. *Lloyd* v. *Spillett*, 2 Atk. 150. It is presumed that the stranger was not intended to enjoy the beneficial interest. Yet it may be shown by extrinsic evidence that the full benefit was bestowed. *Rider* v. *Kidder*, 10 Ves. 360. And so where the purchaser takes the title in the name of some member of his family, the fact of the relation is supposed to rebut the resulting trust, and establish a presumption that the holder of the title was intended to take the entire interest. 1 Perry on Trusts, 4th ed., § 143. But this presumption is based upon the "moral, natural, or legal obligation to provide" for the nominal purchaser; and no such obligation here seems to rest upon the wife. Yet, waiving that objection, it is generally held that evidence may repel the presumption arising from the family relation; *Butler* v. *Ins. Co.*, 14 Ala. 777; and the question is regarded as one of intention. *Dyer* v. *Dyer*, 2 Cox, 94. So that the propriety of this decision, that there must be a clear contract or promise by the husband, is at least doubtful. *Moulton* v. *Haley*, 57 N. H. 184.

TRUSTS — RESULTING — STATUTE OF FRAUDS. — In a deed conveying land which is absolute in its terms and contains the usual declaration of uses in favor of the

grantee, absence of consideration, if shown merely by parol evidence, is not sufficient under the Statute of Frauds to raise a resulting trust in favor of the grantor, where there has been no fraud in procuring the deed. *Lovett* v. *Taylor*, 34 Atl. Rep. 896 (N. J.).

The decision follows the great weight of authority in this country. 1 Perry on Trusts, 4th ed., § 162, and also the earlier cases in England; *Lloyd* v. *Spillet*, 2 Atk. 148; but the more recent English cases are almost directly in opposition. *Davies* v. *Otty*, 35 Beav. 208; *Childers* v. *Childers*, 1 DeG. & J. 482; *Haigh* v. *Kaye*, 7 Ch. App. 469. The ground on which these decisions rest is that, although the Statute of Frauds makes of no value parol evidence of lack of consideration for the purpose of raising a resulting trust in such a case, yet the mere subsequent holding by the grantee after demand is a fraud of such a nature as to take the case out of the statute. The answer given to this line of reasoning in *Randall* v. *Randall*, 9 Wis. 379, is that the fraud alleged does not occur in procuring the deed, and therefore is not one that the statute takes cognizance of in limiting its own application.

TRUSTS — SEPARATE USE — RESTRAINT AGAINST ANTICIPATION. — By the Married Women's Act of 1882, all the separate property of a married woman — after acquired as well as that owned at the time the engagement was entered into — was made liable for her obligations. Sec. I. sub-sec. 19, however, provided that nothing in the act should "interfere with or render inoperative any restriction against anticipation." The appellant's assignor obtained a judgment against respondent, a married woman. At the time the judgment was rendered there was due to respondent accrued income from property settled to her separate use without power of anticipation. *Held*, reversing *Loftus* v. *Heriot*, [1875] 2 Q. B. 212, that the restraint on anticipation is gone the moment the income becomes due and payable; that appellant therefore was entitled to have his judgment paid out of income due before the date of the judgment. *Hood Barrs* v. *Heriot*, [1896] A. C. 174 (House of Lords).

While the decision in the principal case is carefully limited to the case of income accrued before judgment, the *ratio decidendi* deals a death blow to the authority of those cases in which it has been held that income accrued after judgment on property subject to a restraint is not subject to seizure. *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559. This decision, recognizing much broader rights in a creditor as against a married woman's estate than he has hitherto been supposed to possess, is of great practical importance in England.

The decision in the principal case has a suggestive bearing in connection with the doctrine of spendthrift trusts. Granting the validity of such trusts, has not the beneficiary complete power of disposition over accrued income of the trust which the trustee is bound to pay him? If he has full power of disposition over such accrued income, is it not liable to seizure by his creditors? On the facts of *Steib* v. *Whitehead*, 111 Ill. 247, and *Smith* v. *Towers*, 69 Md. 77, apparently such accrued income is not liable to seizure. In neither of these cases, however, was the point here suggested argued; in both cases the opinion deals solely with the question of the validity of a spendthrift thrust.

WILLS — CONSTRUCTION. — Testator, having a lawful wife, whom he had deserted, married again and lived with the second wife until he died. By his will he bequeathed certain property to his "wife." *Held*, that, on the evidence, the second wife was intended and should take. *Pastene* v. *Bonini*, 44 N. E. Rep. 246 (Mass.).

The decision shows the court's opinion to be that it is competent to show, by evidence, that an inaccurately described legatee is intended, though the description may accurately apply to another. The case resembles, in this respect, *Grant* v. *Grant*, L. R. 5 C. P. 727. It is probable that in *Tucker* v. *Seaman's Aid Society*, 7 Metc. 188, the evidence was not sufficiently strong in favor of the party inaccurately described, and that that case is really not *contra* to the present decision. The principal case is interesting, also, as showing the refusal of the court to recognize any rule of law which declares that wife shall mean "lawful wife," or any presumption to that effect. *Hardy* v. *Smith*, 136 Mass. 328, followed. The analogous presumption raised by the law, namely, that "children" means legitimate children (*Doe d. Thomas* v. *Beynon*, 2 A. & E. 431) was not overlooked by the court, but rather disregarded.